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Supreme Court of the United States

October Term, 1958.

No. [redacted] 117

ROSARIO MANCUSO, *Appellant Petitioner,*

against

COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT.

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THE REPORTER COMPANY, INC., Walton, N. Y.—1959

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Supreme Court of the United States

OCTOBER TERM, 1959.

No.

ROSARIO MANCUSO,
Petitioner,
against
COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK.

JURISDICTIONAL STATEMENT

(a) Opinions Below

The Court of original jurisdiction wrote no opinion. The opinion of the Appellate Division is reported at 7 App. Div. 2d 48, 180 N. Y. S. 2d 496, under the name of *Commission of Investigation vs. Lombardozzi.* A copy is hereto annexed as Exhibit A. The Court of Appeals wrote no opinion, but merely a memorandum citing *Knapp vs. Schweitzer,* 357 U. S. 371. That has not yet been reported, either officially or unofficially. A copy is hereto annexed as Exhibit B.

Its final order, or remittitur was amended on April 16, 1959, to read:

> "Upon the appeal herein on behalf of the appellant Mancuso there were presented and necessarily passed upon the following questions, viz:
>
> "1. Whether the procedure whereby the appellant Mancuso was committed deprived him of his right to a fair hearing and of a reasonable opportunity to prepare a defense which he claimed was tantamount to a deprivation of his right to counsel, as guaranteed by Amendments IV, V, VI, VII, and XIV of the United States Constitution;

"2. Whether the law creating the Commission of Investigation is unconstitutional so as to grant ill-defined and omnipotent powers to the Commission;

"3. Whether the immunity granted appellant Mancuso was defective so as to deprive him of his rights under the Fifth Amendment to the United States Constitution; and

"4. Whether appellant Mancuso was deprived of his liberty for an indefinite time in violation of the Eighth Amendment to the United States Constitution.

"This Court held that the rights and privileges of this appellant under the United States Constitution were not infringed or violated."

This has not yet been reported, either officially or unofficially.

(b) Grounds of Jurisdiction

(i) The proceeding was instituted by appellee pursuant to Section 406 of the Civil Practice Act of the State of New York to commit appellant (with others) to jail until he shall have answered various questions before appellee. Appellee was authorized to act under Chapter 989 of the Laws of 1958 of New York (Unconsolidated Laws, Section 7051 ff.). Copies of both statutes, so far as here relevant, are annexed as Exhibit C.

(ii) The final order of the Court of Appeals was made and entered on March 13, 1959. No application was made for rehearing. The notice of appeal was filed on April 13, 1959, with the Clerk of the County of New York, with whom all papers in this proceeding have been filed.

(iii) The jurisdiction of this Court is invoked under 28 United States Code, Section 1257 (2).

(iv) Cases believed to sustain the jurisdiction are:

Young vs. California, 308 U. S. 147;
Kunz vs. New York, 340 U. S. 290;
Adler vs. Board of Education, 342 U. S. 485;
Slochower vs. Board of Higher Education, 350 U. S. 551.

(v) The State statutes involved are New York Civil Practice Act, Section 406, and New York Laws of 1958, Chapter 989 and Section 2447 of the Penal Law of New York. These are set out verbatim in Exhibit C.

(c) Questions Presented

1. Is Section 406 of the Civil Practice Act of the State of New York unconstitutional as applied to appellant because it deprived him of a reasonable opportunity to prepare a defense and therefore deprived him of his right to counsel, as guaranteed by Amendments V, VI and XIV of the United States Constitution, in view of the fact that he was served with final papers for a hearing at 5:30 at night and was on his way to jail before 6:00 o'clock on the same night in spite of his attorney's demands to be heard and in spite of his attorney's demands for an adjournment to prepare a defense?

2. Is Chapter 989 of the Laws of 1958 of the State of New York unconstitutional in granting ill-defined and omnipotent powers to the Commission as outlined in *Sweezy vs. New Hampshire*, 1957, 1 Led. 2d 1311, and do said powers violate the Fourteenth Amendment of the United States Constitution?

3. Is Section 406 of the Civil Practice Act of the State of New York, and Section 7 of Chapter 989 of the Laws of 1958 of the State of New York, unconstitutional as applied to appellant because they deny him due process of law in violation of the Fourteenth Amendment of the United States Constitution, in view of the requirement of said Chapter 989 that the State Authorities cooperate with

Federal Authorities, and of the fact that the appellant had been subpoenaed and did testify before a committee of the United States Senate and before a Federal Grand Jury sitting for the Federal Government? And further, because said laws abridge a privilege granted to him, a citizen of the United States, by the said Fourteenth Amendment of the United States Constitution and by the Fifth Amendment of the United States Constitution.

4. Is Section 406 of the Civil Practice Act of the State of New York unconstitutional as applied to this appellant because he was deprived of his liberty for an indefinite term in violation of the Eighth Amendment of the United States Constitution?

5. The following question, although not certified by the Court of Appeals is presented as outlined in the Notice of Appeal: Does appellant have a right to assemble freely as guaranteed by the First and Fourteenth Amendments?

(d) Statement of the Case

On August 12, 1958, in response to a subpoena served upon him to testify on certain matters (but not including conspiracy or monopoly), the appellant appeared at 100 Center Street, New York City, before the newly-formed Commission of Investigation of the State of New York. The Chief Commissioner then read a statement to the entire assemblage stating the purpose of the hearing, was, among other things, an investigation of conspiracy and Section 340 of the General Business Law (monopoly) (fol. 139). Appellant was the second witness examined on that day by the Commission, which had decided to make this hearing public. The appellant was ordered to remain in another room to wait his turn (fol. 142). Thereupon the appellant was then asked various questions, some of which he answered (fols. 285 to 287), declining to answer others

on the grounds that his answers might tend to incriminate him. Whereupon the Deputy Commissioner, reading from a prepared statement, asked that immunity be granted. Appellant's counsel requested to be heard before a vote was taken (fol. 300) but that was denied (fol. 300). Immunity was then allegedly granted (fol. 315). The Commission was then asked by appellant whether or not there were consultations and collaboration with Federal Authorities, but the Commission refused to answer (fol. 306). They were asked whether or not other prosecuting attorneys were notified concerning the alleged grant of immunity (fol. 313), but that was not answered. They were asked what, specifically, the immunity covered and the Chairman replied that he had immunity from prosecution on account of any transaction, matter of things of criminal nature which may be revealed by your "truthful and responsive answers * * *" (fol. 316).

The Commission was then told that this appellant was under Federal and State investigation by several agencies. Appellant challenged the constitutionality of the law creating the Commission (fol. 321) and further challenged the pertinency of questions asked (fol. 322), and that granting of immunity could not be delegated to an administrative body (fol. 309).

Thereupon the appellant was directed to answer, by the Commissioner, each and every question and he continued to refuse on the grounds of self-incrimination.

The hearings were adjourned to 2:30 of that afternoon, at which time the appellant was served with an order to show cause why a warrant should not be issued immediately to apprehend the defendant and commit him to jail forthwith, until he answers the questions. Said order was signed on the same day (August 12, 1958) and was based on an eight (8) page affidavit mimeographed with the name of the appellant and appropriate dates typewritten.

The list of questions not answered were not made a part of the affidavit or the order to show cause. The affidavit recited the fact that Section 406 of the Civil Practice Act of the State of New York was being used as a punitive (and therefore criminal) statute to "demonstrate" to this appellant and to "others" that certain acts will not be tolerated or permitted to "pass unpunished * * *" (fols. 90-91).

Thereafter, before appellant or his attorney had a chance to read the order to show cause, the appellant was directed to go to another building. Appellant's attorney tried to study the order to show cause while the first witness was having his "hearing" before Judge Spector. In the courtroom many newspaper reporters were asking questions of the appellant and his attorney who tried to listen to the hearing of the first witness. At about 5 P. M., the first witness was led away, apparently under arrest. The Judge left the courtroom and appellant and his attorney waited. It was later learned that the Judge announced an adjournment of the hearing of the appellant until "I get a copy of the transcript so that I may read it" (fol. 755). However, neither appellant nor his attorney heard it as they were toward the back of the courtroom and there seemed to be much confusion and talking at the bench (see fol. 733). Appellant's attorney was then served with papers, at 5:30 P. M. on the same day (fol. 763). He subsequently learned that these papers were a proposed order and a proposed warrant with the list of questions allegedly unanswered. The Commission attorney then informed appellant's attorney that "to save the time of the Court, since this is quite late," that he would be glad to reply to any objections (fol. 758).

Appellant's attorney asked the Court for an adjournment for time to answer and file objections and that was denied (fol. 762). Appellant's attorney appeared specially

(fol. 762), asked for a vacation of the order to show cause on the grounds that the questions were not attached, and that was denied (fol. 765). The Court was asked whether or not the motion was in the nature of a criminal charge (fol. 783), and the Court replied "Yes" (fol. 784). Appellant's attorney asked for a jury trial and that was denied (fol. 785). Transcript of the minutes of the hearings that morning were finally introduced as an exhibit (without affording appellant's attorney an opportunity to object) and the Court stated that it was prepared to act on the motion. The exhibit was handed to the Judge at about 5:45 P. M. At about 5:50 the Court granted the motion in spite of the fact that the intervening five (5) minutes were taken up by discussions between the Court and both attorneys (fols. 783-786). The Court then found (without asking) that the appellant "* * * still refused to answer without cause" (fol. 787). Counsel was informed by the Court that this was the only opportunity he had to prepare and present his defense (fol. 783).

A memorandum on the law by the Commission attorney was submitted to appellant's attorney two (2) days later.

The Appellate Division recognized many of the questions raised but held the jailing valid, citing *Knapp vs. Schweitzer*, 357 U. S. 371 (7 App. Div. 2d 56, 57), and criticized the "precipitate haste with which the proceedings were conducted." However, the Court held no prejudice thereby.

The Court of Appeals affirmed without opinion except to cite the *Knapp* case.

The Amendment of Remittitur contains all but one of the issues raised (the exception is Point "V," *supra*).

How Issues Raised in State Court

All of the above numbered issues were raised in the courts in Appellant's Brief.

The Federal questions raised are substantial ones (or if a writ of certiorari should issue the reasons are below outlined)

BRIEF OF QUESTIONS PRESENTED

POINT I

All of the proceedings precipitating this appeal took place in *one day*. The final papers for a notice for hearing were served about one-half hour before the appellant was on his way to jail. The decision below does not give proper weight to the following decisions of this Court:

Chanler vs. Fretag, 348 U. S. 3 (see p. 10);
Powell vs. Alabama, 287 U. S. 45 (see pp. 58-59);
Coe vs. Armour Fertilizer, 237 U. S. 413;
Cooke vs. U. S., 267 U. S. 517;
Re Oliver, 333 U. S. 257.

POINT II

The law creating the New York State Crime Commission (Chapter 989 of the Laws of the State of New York) violates the Fourteenth Amendment in that it gives the Commission a broad and ill-defined scope of inquiry without limitation and coupled with its use of contempt power, violated the Fourteenth and the Fifth Amendments of the United States Constitution. The decision below does not give proper credit to *Sweezy vs. New Hampshire*, 354 U. S. 234.

POINT III

If appellant's counsel had an opportunity to be heard on August 12, the day of the hearing and jailing, he would have shown that the United States Government brought a motion to inspect the minutes of a State Grand jury sitting for appellant's county and investigating appellant. The motion was brought May 23, 1958, and was still pending when these "hearings" were held (see Point IV of Appellant's Brief).

> State of New York, County of Oneida, Supreme Court, *In the Matter of the Application of William J. King.*

In addition, the appellant had appeared before a Federal Grand Jury held for the Southern District of New York and had appeared before the United States Senate Committee on Labor and Management and he informed the Commission of this fact (fol. 321).

The question left open in *Knapp vs. Schweitzer*, 357 U. S. 371 (at p. 380), has not yet been answered. The instant case is one of collaboration between State and Federal authorities both actually and by operation of statute. Appellant raised instances of such collaboration in his brief, namely, Point IV. Senator McClellan and others acknowledged such collaboration. (Investigation of Improper Activities in the Labor and Management Field, Hearing Before the Select Committee 85th Congress Second Session, Pursuant to Senate Resolutions 24 and 221, June 30, July 1, 2 and 3, 1958, at pp. 12213 and 12488.)

Indeed the appellant has recently been named as a co-conspirator in an indictment recently handed down by the Federal Grand Jury sitting for the Southern District of New York.

Both the Appellate Division and the Court of Appeals considered *Knapp vs. Schweitzer.*

Recently this Court held that a citizen could be put twice in jeopardy for the same act under both Federal and State prosecution. This decision merely affirmed prior decisions of this Court.

Bantkus vs. Illinois, 3 Led. 2d 684;
Abbet and Falcone vs. The United States, 3 Led. 2d 729;
United States vs. Lanza, 260 U. S. 377;
Fox vs. Ohio, 92 Led. 213.

Since under this "dual sovereignty" argument there can be double jeopardy then there should at least be double immunity. That is, a State ought not to be allowed to grant immunity where Federal prosecution is a certainty and therefore *Knapp vs. Schweitzer*, and cases related should be reviewed.

POINT IV

The appellant is committed indefinitely. He is to be released when he answers "truthfully and responsively." A four-man Commission decides such truth or responsiveness.

See *Valenti vs. McCloskey*, New York, Law Journal, March 30, 1959, page 11;
See *Ex parte Hudgings*, 244 U. S. 378; *In re: Michael*, 326 U. S. 224.

POINT V

The appellant had a right to peaceably assemble and said right is guaranteed by both the First and Fourteenth Amendment of the United States Constitution. The appellant raised in his brief in the Court of Appeals that there was no evidence of any crime committed at Apalachin by this appellant or any one else (see minutes of Sub-Committee on the Joint Legislative Committee on Government Operations of the State of New York held in the Senate Chambers, Capitol, Albany, New York, on December 12, 1957, where Sgt. Edgar D. Croswell testified "* * * we had no basis on which to hold them").

Respectfully submitted,

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APPENDIX

Exhibit A

BASTOW, J.:

We consider together appeals by seven respondents in separate proceedings seeking a review of orders made at Special Term. Procedural differences in disposing of the applications at Special Term require the preliminary statement that five respondents (Frank Valenti, Mancuso, Riccobono, Castellano and Miranda) appeal from orders made by Spector, J., and two respondents (Lombardozzi and Peter Valenti) appeal from orders by Tilzer, J.

In August, 1958, the appellants were served with subpoenas issued by the Commission of Investigation of the State of New York commanding them to appear at a public hearing being conducted by the Commission in New York City. At the first hearing on August 12, 1958 the chairman announced that the hearing was being held in connection with what is now known as the Apalachin meeting in November, 1957, at the residence of one Joseph Barbara in Tioga County. The purposes of the hearing were stated to be, among other things, "Whether crimes of conspiracy, violation of section 340 of the General Business Law which pertains to monopoly or restraint of trade statutes, bribery of public officials or any other crimes were committed or planned at this meeting." There followed individual hearings for each of the appellants commencing on August 12 and ending on August 19. Each was represented by one or more counsel at the hearings and in the subsequent court proceedings.

The pattern of the proceedings when each appellant appeared before the Commission was much the same. Each was asked a series of questions numbering between 30 and 40. Responsive answers to these questions would have been relevant to one of the subjects of the investigation as stated

in each subpoena to be "the organization, purposes and participants of, and discussions had and decisions made at" the Apalachin meeting. Other than identifying themselves, appellants refused to answer all questions. Such refusals were based on the privilege against self-incrimination and other grounds, most of which are presented upon this appeal and will be hereinafter considered.

Following the respective refusals to answer questions, the members of the Commission purporting to act under statutory authority (L. 1958, ch. 989, §7) voted to and did purport to confer immunity upon each appellant in accordance with section 2447 of the Penal Law. Each witness was then informed that he had immunity "from prosecution by the New York State authorities on account of any transaction, matter or thing of a criminal nature which may be revealed by your truthful and responsive answers to the particular questions which this Commission * * * may now direct you to answer." Thereafter, each appellant was asked some 26 questions which were among those previously propounded. Again each witness refused to answer the questions upon stated grounds. The direction was made that the questions be answered but each appellant persisted in his refusal.

We consider first the ensuing court proceedings relating to the five appellants who appeared before the Commision on August 12, 13 and 15. As to each, individual orders were obtained directing the named witness to show cause, either forthwith or upon the same day that he had testified, why a warrant should not issue for his apprehension and commitment forthwith to jail there to remain until he answered the questions. The show cause order was supported by an affidavit of the Commission chairman and a copy of the subpoena. Following a hearing in each case, and to which we shall advert subsequently, the applications were granted and warrants issued for the imprisonment of the five appellants until each answered the questions set forth in the warrant.

The other two appellants were brought before Special Term the day after the Commission's hearing. In the interim, transcripts of the Commission's hearing were forwarded to the court and counsel. Upon request of these appellants an adjournment of two days was granted. At that time appellants produced certain witnesses and while they complain of erroneous rulings in the course of the examination of these witnesses, it does not appear from either record or briefs that they attack the validity of the court hearings upon the ground that there was a summary determination without an adequate hearing. At the conclusion of this combined hearing the applications were granted and similar warrants issued for the imprisonment of the witnesses.

It is against this background that we consider the various contentions of the appellants. It is claimed that the act (L. 1958, ch. 989) creating the respondent Commission is unconstitutional and in violation of the State constitutional provision (Art. V, §3). To place in focus this contention it is necessary to point out that section 2 of article V of the Constitution provides for nineteen civil departments in the state government. Section 3 then provides in part that "No new departments shall be created hereafter, but this shall not prevent the legislature from creating temporary commissions for sp ·ial purposes • • •."

Turning to the enactment (L. 1958, ch. 989) under attack we find in section 1 the provision that "There is hereby created a temporary state commission of investigation." The four commissioners are to be appointed for a term of five years (§2) and the act is to remain in effect for five years (§13). Judged by any standards the commission is a temporary one and so at least one appellant concedes in his brief. It is unnecessary to recite in detail the functions, powers and duties set forth in the eleven subdivisions of section 2 of the act. We construe them as being "special purposes" within the meaning of the language set forth

in the exception to the constitutional prohibition against the creating of new state civil departments.

One of the landmark decisions construing this constitutional provision is *Matter of People (Westchester Title & Trust Co.)*, 268 N. Y. 432. There it was held that an act creating a Mortgage Commission and transferring to it the powers vested in the Superintendent of Insurance to control and administer mortgage investments of guarantee companies came within the plain intendment of the constitutional provision. The court placed emphasis upon the abnormal if not emergency conditions that existed. The court stated (p. 443) that such conditions "call for prompt action and, in the opinion of the Legislature, no department is now equipped for such action. The Commission is created for the special purpose of prompt and effective action during the period when there is special need for prompt and effective action by a public agency properly equipped for that purpose."

In *Matter of Di Brizzi (Proskauer)*, 303 N. Y. 206, the court passed upon the right of the Governor and Attorney General to create by joint action a State Crime Commission under the provisions of subdivision 8 of section 62 of the Executive Law. In upholding the validity of the action it was said (p. 216) that "This is a *general* investigation into *organized* crime and its relation to government. As an incident thereto, it may be that the existence of specific, individual crimes will be uncovered, but that will merely be collateral and subordinate to the main object of inquiry. The purpose of the investigation is to secure information to guide executive action, not to indict or punish any individuals." The statute under consideration authorizes similar general investigations for the guidance of both the executive and the legislature. Pursuant to its legislative power (Constitution, Art. III, §1) the legislature was vested with power to enact the statute and we conclude that it was not violative of section 3 of Article V.

The appellants make various attacks upon the immunity conferred upon them by the Commission. Section 7 of the enactment (L. 1958, ch. 989) provides in substance that in any investigation or hearing conducted by the Commission, relating to any crime with respect to which, by express statutory provision, a competent authority is authorized to confer immunity, such may be conferred by the Commission in accordance with the provisions of section 2447 of the Penal Law, "* * * but only after affording the attorney-general and the appropriate district attorney the opportunity to be heard in respect to any objections which they may have to the granting of such immunity." Without attempting to consider seriatim the contentions of the several appellants we state our views that lead to the conclusion that immunity was properly conferred upon each appellant.

The Commission, as has been noted, placed upon the record that it was investigating, among other things, whether the crimes of conspiracy or bribery of public officials had been committed. (Penal Law §§378, 580.) By express statutory authority (Penal Law §§381, 584) certain named officials and bodies are authorized to confer immunity in accordance with section 2447 of the Penal Law. The act under consideration extended this authority to the Commission. At the hearings each appellant was carefully informed of such grant and the extent of the immunity flowing therefrom. This is found in subdivision 2 of section 2447 where it is stated that "immunity", as used therein, "means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceedings." The immunity so conferred was not limited to the crimes the Commission had stated it was

investigating. It was complete immunity whether the answers given might involve the witness in the crimes of bribery or conspiracy or any other crime provided, of course, that the answers were truthful and responsive to the questions. Thus, appellants received immunity coextensive with their privilege against self-incrimination. (N. Y. Constitution Art. I, §6.)

Appellants further contend the proffered immunity was worthless since the facts were not disclosed regarding communications between Commission, the attorney-general of the State, and various district attorneys. As indicated above, Section 7 of the act creating the respondent (L. 1958, ch. 989) provides that its right to confer immunity is to be exercised only after affording the attorney-general and the appropriate district attorney the opportunity to be heard in respect of any objections which they may have to such grant of immunity. In passing it might be noted that a similar provision is found in section 2447 (subd. 3, par. [d]) of the Penal Law. This section was enacted as a result of recommendations filed by the New York State Crime Commission in 1953. (See Third Report of the Commission Leg. Doc. No. 68 [1953] pp. 14-16). After recommending therein that the power to grant immunity be given to a "competent authority" which was defined, among other things, as "a majority of a legislative * * * commission", it was said (p. 16): "The legislation might also provide that any official or official group, other than a court, authorized to grant immunity, before so doing should as a matter of course consult with the appropriate district attorney."

When requested in these proceedings, the Commission informed each appellant that it had afforded the attorney-general and the appropriate district attorney an opportunity to be heard in compliance with section 7 but refused to specify the details thereof. We find no error in that decision. The grant of immunity was absolute. It appears to have been the legislative intent that before such extensive

power was exercised by the Commission, as a matter of governmental comity, it should give certain public prosecutors an opportunity to be heard to enable them to induce the Commission to withhold the granting of such immunity for reasons advanced, which might have been unknown or overlooked by the Commission. But the opportunity to be heard was not a restriction on the power. If objections were made by prosecutors and not heeded by respondent, the witness would not be the less protected. Assuming the Commission acted improvidently in the face of objections it might be subject to correction in an official forum or otherwise. Such eventual correction, regardless of what effect it might have on the Commission, individually, or as a body, could not detract from the immunity already granted. Thus, in stating that the attorney-general and appropriate district attorney had been afforded an opportunity to be heard, the respondent sufficiently complied with the statute. It was not for appellants to go further into the matter. When the immunity is granted it is not at the peril of the witness but at the peril of the Commission if it fails to comply with the requirements of the statute.

Lastly, upon this subject, the appellants claim that the immunity so conferred was invalid since it does not protect them from subsequent prosecutions by Federal authorities. This question has been recently passed upon by this court in *People v. Costello*, 6 A. D. 2d 385, in the light of *Knapp v. Schweitzer*, 357 U. S. 371. In the *Costello* case we said that "Although the potential expose to Federal prosecution asserted by appellant seems reasonable enough, since the Federal government might form an interest in the answer which he could give concerning the written notations on the paper found in his pocket, this exposure is not a ground for excusing the answers where the immunity which flows from State law is as adequate as the State can make it against its own subsequent prosecution. (*Dunham v. Ottinger*, 243 N. Y. 423.) This rule is not, of course, open to re-examina-

tion here. (Cf. dissenting opinion by Black and Douglas, JJ., in *Knapp v. Schweitzer, supra*, p. 383.)"

The appellants, however, renew their claims as to the inadequacy of the conferred immunity upon the ground that one of the functions of the Commission is to "cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state." (L. 1958, ch. 989, §2, par. 5.) This does not alter our opinion as expressed in the *Costello* case. As we understand the *Knapp* case the crucial holding was that the sole "purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth." (357 U. S. 371, 380.) It has been heretofore found that the State conferred upon appellants complete immunity. It is unnecessary for this court to speculate as to what the effect of this might be in the event of subsequent Federal prosecution under circumstances here open only to conjecture. The test is whether the immunity gives protection against State prosecution— "• • • all that the State is required to or can do is to give immunity against its own processes and, if it has done that, as this statute does it, it has satisfied the requirements of the Constitution." (*Dunham v. Ottinger*, 243 N. Y. 423, 438.)

In sum, every person owes a duty to the State to testify when called before a duly constituted authority. However, he may not be compelled to testify when he claims his privilege against self-incrimination. But that privilege disappears when the State removes any danger of criminal prosecution—based on any testimony he may give—by granting immunity securing the witness against such prosecution. Hence, when immunity is properly tendered to a witness claiming his constitutional privilege, he must answer or suffer the consequences of his contumacy. The

object of the constitutional privilege is fully accomplished when immunity is granted.

We recognize that in *Knapp v. Schweitzer, supra*, the court posed but left unanswered the question as to whether in the case of collaboration between state and federal officials, a defendant might successfully assert his privilege in the state proceeding. Moreover, it is suggested therein that evidence so obtained might be excluded in a federal prosecution. This suggestion is re-enforced by the views expressed by some of the Justices in separate opinions that the rule enunciated in *Feldman v. United States*, 322 U. S. 487, should be reconsidered. All of this presents a wide area for judicial discussion. This court, however, in the absence of the expression of a contrary view by the Supreme Court, is bound by the rule of law enunciated in *Dunham v. Ottinger, supra* (243 N. Y. 423, 438). There, as heretofore stated, it was held that the State is only required to give immunity against its own processes and when that is done the Constitutional requirements have been satisfied.

Finally, the appellants contend that the Commission pursued the wrong remedy in bringing these proceedings pursuant to section 406 of the Civil Practice Act. Moreover, they claim that if the section is applicable the proceedings at Special Term were conducted in such a manner as to be violative of the due process clauses of the state and federal constitutions. The appellants argue that the witnesses, if they are in contempt, may only be prosecuted in a criminal proceeding concerning such contempt (Judiciary Law, §750). Section 406 provides, in substance, that when a witness, such as these appellants, attending before a body, such as respondent, "refuses without reasonable cause * * * to answer a legal and pertinent question * * * the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail, there

to remain until he submits to do the act which he was so required to do or is discharged according to law." The distinction between this section and the provisions of the Judiciary Law (Art. 19) is that the latter are punitive in nature whereas section 406 is coercive alone. (Cf. *Matter of Delehanty* [*Sullivan*], 202 Misc. 33, affd. 280 App. Div. 542, affd. 304 N. Y. 725.)

In *Matter of Barnes*, 204 N. Y. 108, the court considered a like provision then found in section 856 of the Code of Civil Procedure. Judge Gray wrote (p. 113) that "This statute is, and always has been, a valuable instrumentality in the administration of justice and the enforcement of laws." We find no authority that required the Commission to proceed to invoke the punitive provisions of a criminal contempt as distinguished from its applications for coercive relief to compel the witnesses to testify.

A more troublesome question is presented as to whether appellants were accorded due process in connection with the court proceedings on August 12, 13 and 15. In *Matter of Barnes, supra*, one of the questions before the court was whether a summary conviction under the predecessor section violated a constitutional right. Some of the members of the court were of the opinion (1) that a summary conviction without notice violated no constitutional right and (2) that even if notice were necessary, the court could read into the section a provision requiring notice to be given. A majority of the court, however, while disagreeing with the first proposition held (p. 122) that the language of the section "may be so construed as to require notice to one charged with the contempt, and that when read in connection with the provisions of the Judiciary Law relating to criminal contempts, the question is removed from the realm of doubt."

In these proceedings there can be no question that notice was given in the form of show cause orders based upon an affidavit made by the chairman of the Commission setting forth in some detail service of the subpoena and the ensuing proceedings before the Commission. A transcript of the

testimony in each proceeding was made available to the court and counsel for the witness. The disturbing feature of the proceeding is what took place in Special Term in connection with five of these appellants. As had been stated heretofore, these witnesses were brought before Special Term on the same day each had been called to testify. All requests for adjournments were denied. There was, however, a hearing and counsel for each appellant advanced in various ways many of the same contentions that are presented to this court and discussed herein. A careful reading of the record of the five proceedings discloses that, in substance, each counsel requested additional time to submit a brief or examine the law. Counsel was of the opinion that there were many intricate questions of law that should be explored. The court was of the opinion that the legal questions were simple and should be passed upon at once. We do not find any request for an adjournment to enable appellants to produce evidence either documentary or by witness. The precipitate haste with which the proceedings were conducted does not meet with our approval. However, the ultimate question is whether there was any prejudice to appellants amounting to a denial of due process because they were denied adjournments so their counsel could examine the law and submit briefs. After the passing of weeks we have examined the same questions, together with others advanced by appellants, and determine that Special Term was correct in its legal decisions and in the action taken.

The contentions of the remaining two appellants that they were not accorded due process are without substance. As to them, adjournments were granted when counsel stated that they desired to submit proof. Subsequently, witnesses were called in an attempt to prove cooperation between state and federal law enforcement agencies as bearing upon the completeness of the granted immunity. What has heretofore been written upon this subject makes it clear that

such testimony was irrelevant and properly excluded. The same conclusion is reached as to the court's rulings excluding testimony relating to the notice given by the Commission to other state prosecutors before conferring immunity.

It has been said that "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. * * * Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it." (*Dohany v. Rogers*, 281 U. S. 362, 369.) When the contentions of appellants are considered in the light of this legal principle it cannot be found that there was any denial of due process. They received reasonable notice. Some had been subpoenaed two weeks before the date of their appearance. Each was represented by counsel and after complete immunity had been granted each persisted in his refusal to testify.

Thereupon, they were brought before Special Term in proceedings instituted pursuant to section 406 of the Civil Practice Act. The burden then placed upon appellants to justify their refusal to answer the questions was the establishment by them of a sufficient cause for which a reason could be and was given. The reasons so advanced consisted of legal contentions that the creation of the Commission was unconstitutional and that the immunity conferred was either defectively accomplished or not adequate to protect them from subsequent prosecution. After hearings Special Term found that no reasonable cause had been shown by appellants for their refusals to answer the questions. The decisions were properly made pursuant to section 406 after hearings that met the requirements of due process.

The orders appealed from should be affirmed.

All Concur.

Exhibit B

COURT OF APPEALS

OF THE STATE OF NEW YORK

IN THE MATTER

of

The Application of the COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, by MYLES J. LANE, Chairman, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, Commissioners,

Petitioner-Respondent,

To Commit

FRANK JOSEPH VALENTI, ROSARIO MANCUSO, JOSEPH RICCOBONO, PAUL CASTELLANO and MICHELE MIRANDA,

Respondents-Appellants,

to Jail, Pursuant to Section 406 of the Civil Practice Act.

BE IT REMEMBERED that on the 15th day of January in the year of our Lord one thousand nine hundred fifty-nine, FRANK JOSEPH VALENTI, & ors., the appellants in this case, came here into the Court of Appeals, by Gilbert S. Rosenthal, & ors., their attorneys, and filed in the said Court Notices of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the First Judicial Department, and the Commission of Investigation of the State of New York, by Miles J. Lane, Chairman, & ors., Commissioners, the respondent in said cause, afterwards appeared in said Court of Appeals by Eliot H. Lumbard, its attorney,

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Harris B. Steinberg, of counsel for the appellants, Castellano and Miranda, and by Mr. Gilbert S. Rosenthal, of counsel for appellant Valenti, submitted by the remaining appellants and argued by Messrs. Eliot H. Lumbard and Nathan Skolnik, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the orders of the Appellate Division of the Supreme Court appealed from be and the same hereby are affirmed (*Knapp v. Schweitzer*, 357 U. S. 371, 380-381).

And it was also further ordered, that the records aforesaid and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon accordingly.

Therefore, it is considered that the said orders be affirmed, etc., as aforesaid.

And hereupon, as well as the Notices of Appeal and return thereto aforesaid, as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

Raymond J. Cannon,
Clerk of the Court of Appeals of the
State of New York,
Court of Appeals, Clerk's Office,
Albany, March 13, 1959.

Exhibit C

New York Civil Practice Act

"§ 406. Subpoena Issued by Judge, Arbitrator, Referee or Other Persons, in Certain Cases.

(Clavenger's Practice Manual, 1958 ed., p. 4-63)

1. When a judge, or an arbitrartor, referee or other person, or a board or committee, has been heretofore or is hereafter expressly authorized by law to hear, try or determine a matter, or to do any other act in an official capacity, in relation to which proof may be taken, or the attendance of a person as a witness may be required; or to require a person to attend, either before him or it, or before another judge, or officer, or a person designated in a commission issued by a court of another state or country, to give testimony, or to have his deposition taken, or to be examined; a subpoena may be issued by and under the hand of the judge, arbitrator, referee or other person, or the chairman or a majority of the board or committee, requiring the person to attend; and also, in a proper case, to bring with him a book or a paper. The subpoena must be served in the same manner as prescribed for a service of a subpoena issued out of a court of record. This section does not apply to a matter arising, or an act to be done, in an action in a court of record.

2. A person who is duly subpoenaed, as prescribed in the last subdivision, must obey the subpoena. If he fails so to do, without a reasonable excuse, he is liable, in addition to any other punishment which may be lawfully inflicted therefore, for the damages sustained by the person aggrieved, in consequence of the failure, and fifty dollars in addition thereto, to be recovered in the same manner as prescribed in the case of a person failing to obey a sub-

poena issued out of a court of record. If he fails to attend, the person issuing the subpoena, if he is a judge of a court of record or not of record, or, if not, then any judge of such a court, upon proof by affidavit of the failure to attend, must issue a warrant to the sheriff of the county commanding him to apprehend the defaulting witness and bring him before the officer, person or body before whom or which his attendance was required.

3. If the person subpoenaed and attending or brought as prescribed in the last subdivision before an officer or other person or a body refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was directed to bring by the terms of the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts, by warrant commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law.

4. A warrant of commitment, issued as prescribed in the last subdivision, must specify particularly the cause of the commitment; and, if the witness is committed for refusing to answer a question, the question must be inserted in the warrant.

5. A warrant to apprehend or commit a person, issued as prescribed in this section, must be directed to the sheriff of the county where the person is, and must be executed by him in the same manner as a similar mandate issued by a court of record in an action."

New York Laws of 1958, Chapter 989

(McKinney's Consolidated Laws, Book 65, Part 2
1958-59 Supplement, pp. 75-77)

"Section 2. Functions, powers and duties of the commission. The commission shall have the following functions, powers and duties:

1. The commission shall have the duty and power to conduct investigations in connection with:

(a) The faithful execution and effective enforcement of the laws of the state, with particular reference but not limited to organized crime and racketeering;

(b) The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

(c) Any matter concerning the public peace, public safety and public justice.

. . . . . .

5. The commission shall cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state.

. . . . . .

7. Whenever it shall appear to the commission that there is cause for the prosecution for a crime, or for the removal of a public officer for misconduct, the commission shall refer the evidence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public officer."

"Section 7. Immunity from prosecution.

In any investigation or hearing conducted by the commission pursuant to this article, relating to any crime or

offense with respect to which, by express provision of statute, a competent authority it authorized to confer immunity, the commission may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of the penal law, but only after affording the attorney-general and the appropriate district attorney the opportunity to be heard in respect to any objections which they may have to the granting of such immunity."

New York Penal Law

"SECTION 2447. WITNESSES' IMMUNITY.

(McKinney's Consolidated Laws, Book 39, Part 2, 1958-59 Supplement, p. 211)

1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity; if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided herein.

2. 'Immunity' as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order of competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subject to penalty or

forfeiture for any perjury or contempt committed in answering or failing to answer or in producing or in failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt." * * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 117

ROSARIO MANCUSO,

Appellant,

— against —

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, by MYLES J. LANE, Chairman, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, Commissioners,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

ELIOT H. LUMBARD,
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New York 7, N. Y.

NATHAN SKOLNIK,
Deputy Commissioner,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 117

ROSARIO MANCUSO,

Appellant,

—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, by MYLES J. LANE, Chairman, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, Commissioners,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement

This is a motion pursuant to Rule 16 of the Revised Rules of this Court to dismiss an appeal from an order of the New York Court of Appeals, entered March 13, 1959, which unanimously affirmed, without opinion, an order of the Appellate Division of the Supreme Court, First Department, entered on Decem-

ber 9, 1958 (949).* That Court in turn had unanimously affirmed, with an opinion by Bastow, *J.* (985, *et seq.*; and see Jurisdictional Statement, Appendix, page 13), an order of the Supreme Court of New York County, entered August 12, 1958 (52b). The order granted an application by the Commission of Investigation of the State of New York for a warrant, pursuant to the authority of Section 406, New York Civil Practice Act, committing appellant to jail for his absolute refusal to answer certain questions at a hearing of the Commission into the "Apalachin Meeting" which had been held in New York at Apalachin, Tioga County. On April 16, 1959, the Court of Appeals amended its remittitur upon appellant's application so as to define the precise questions considered (Jurisdictional Statement, page 1).

Six other recalcitrant witnesses were incarcerated under identical orders and warrants for their similar refusals to testify during the same hearing in August 1958. In the New York courts the appeals of all seven were consolidated. Appellant and all but one of the seven so committed are presently confined to the Civil Jail of New York County.

As of this date, Michele Miranda and Joseph Riccobono, two of the other six persons so incarcerated, separately have petitioned this Court for writs of certiorari to the New York Court of Appeals to review the decision affirming their commitments. Miranda's Petition was docketed on May 5; Riccobono's on May 20. A fourth, Paul Castellano, separately has filed both a notice of appeal and a peti-

* Numerals in parentheses refer to folio numbers in the consolidated record on appeal.

tion for a writ of certiorari for review of the New York Court of Appeals decision affirming his incarceration. Both were docketed on May 22. An application by Castellano for bail pending appeal was denied by Mr. Justice Harlan on May 4, 1959.

On June 29, 1959 this Court denied the three petitions for writs of certiorari. 27 U. S. L. W. 3368 (June 29, 1959). The Commission's Motion to Dismiss Castellano's jurisdictional statement is still pending as the time period for Castellano's reply to the motion has not yet elapsed.

The opinion of the Appellate Division on the consolidated appeal is reported as *Commission of Investigation* v. *Lombardozzi, et al.*, 7 A. D. 2d 48, 180 N. Y. S. 2d 496 (1st Dept. 1958), *aff'd without opinion*, 5 N. Y. 2d 1026 (1959).

The Commission.

The Commission of Investigation was established by Chapter 989 of the 1958 Laws of the State of New York, Section 7051, *et seq.*, of the Unconsolidated Laws. Recommendations filed by the New York State Crime Commission in 1953 were closely followed by the Legislature in creating this Commission.

> "The Commission recommends, as such a step, the creation in the Executive Department of a permanent commission, possibly to be called the Commission of Investigation, which would have as its continuing function the investigation of the relationship between crime and government, and any other matters pertaining to the administra-

tion of the criminal laws, and to hold private and public hearings with respect to these matters and make reports and recommendations to the Governor.

"This is not a novel recommendation. One of the model statutes suggested by the Drafting Committee of the Council of State Governments would create an agency 'to make analyses of local problems of organized crime and the efficiency of law enforcement facilities.' The American Bar Association has made a similar recommendation." *First Report of the New York State Crime Commission*, Leg. Doc. No. 23 (1953), pp. 27-30.

Chapter 989 directs the Commission to conduct investigations, *inter alia*, in connection with:

"Section 2(1)(a). The faithful execution and effective enforcement of the laws of the state, *with particular reference but not limited to organized crime and racketeering;*

"(b) The conduct of public officers and public employees, and of officers and employees of public corporations and authorities;

"(c) Any matter concerning the public peace, public safety and public justice." (Italics added.)

The Constitutional Provisions and Statutes Involved

The pertinent constitutional provisions are set forth in the Appendix to this Motion at pages 25 to 26.

The pertinent statutory provisions are set forth in the Appendix to the Jurisdictional Statement at pages 27 to 31.

The Facts

The Apalachin Meeting.

On November 14, 1957 the New York State Police reported stopping and questioning at the rural premises of Joseph Barbara in Apalachin, Tioga County, New York, a large number of persons who reside in various sections of this country and abroad. Appellant and the six persons similarly incarcerated are New York residents and were among this group.

Over 62 persons have been identified publicly as attending the meeting, which has come to be referred to as the "Apalachin Meeting." Almost all of the participants have extensive records of criminal activity. Many are reputed to be influential in illicit activities of one kind or another. Obviously the circumstances under which these individuals were found—the simultaneous attendance of this particular, large and diverse group in a remote location—indicate extensive planning and unity of purpose. And as might be expected, the meeting has attracted extraordinary public attention in the State of New York as the meeting was within its borders and more than 35 of those present were residents of New York.

The Commission's Hearings.

Shortly after its organization the Commission initiated an inquiry into the Apalachin Meeting. Public hearings for this purpose commenced in the Criminal Courts Building, New York County, on August 12, 1958 (130, *et seq.*). The subpoenas by

which appellant and all other witnesses at those hearings were directed to appear before the Commission contained the statement they were being called to testify concerning:

> "* * * the public peace, public safety and public justice, and the faithful execution and effective enforcement of the laws of the State of New York, with particular reference but not limited to organized crime and racketeering, *including the organization, purposes and participants of, and discussions had and decisions made at, a meeting held on the premises of Joseph Barbara on or about November 14, 1957, at Apalachin, Tioga County, State of New York.*" (e.g. 96) (Italics added.)

At the outset of the hearings the Chairman of the Commission read an opening statement to the assembled witnesses and their counsel which set forth the purposes of the hearing in considerable detail (133, *et seq.*). It was repeated and referred to on various occasions to individual witnesses including appellant (191, 282, 382, 478, 588). The statement read, in part, as follows:

> "*In our investigation and through this hearing we aim to ascertain who organized the Apalachin meeting on November 13th and 14th, 1957, the persons who attended, the purpose or purposes, what occurred, what actions were taken and what decisions were made.*
>
> "We intend to find out whether the crimes of conspiracy, violation of Section 340 of the General Business Law, which pertains to monopoly or restraint of trade statutes, bribery of public

officials or any other crimes, were committed or planned at this meeting.

"Moreover, it is our purpose to determine if changes in the law are necessary and, if so, to recommend such measures to the legislature." (Italics added.)

As part of his opening statement the Chairman introduced a copy of the Commission's resolution authorizing these public hearings. The resolution, marked as Commission's Exhibit 1, again set forth the purpose and subject matter of the investigation (279).

The Commission's inquiry into the Apalachin Meeting is continuing within this framework.

Appellant's Conduct Before the Commission.

An individual hearing was held for appellant before the Commission. A similar pattern of events occurred regarding appellant and the other witnesses during their respective Commission hearings.

Each was represented by one or more counsel throughout the Commission and subsequent court proceedings (e.g. 277; 754).

Questions were directed to appellant by the Commission concerning "the organization, purposes and participants of, and discussions had and decisions made at" the Apalachin Meeting (287-297). Other than merely identifying himself (284-286), appellant refused to answer these questions (287-297). His

refusals were based on his privilege against self-incrimination (287-297).

In every instance the Commission, acting under the authority of Section 7 of its Act and in accordance with Section 2447 of the New York Penal Law, thereupon voted to confer and did confer immunity upon appellant and the others (299-301). Appellant's attorney questioned the Commission's power to grant immunity on several grounds but his objections were overruled (301-323). The Commission's action and the effect of its decision regarding immunity were clearly explained to appellant, as well as various consequences which might follow if he refused thereafter to respond candidly and truthfully to the questions to be put to him by the Commission (315-318).

After this instruction the same questions were repeated by the Commission (324-348). As did the others, appellant again refused to make any answer on the basis of the privilege against self-incrimination (325-349).

On behalf of the Commission the Chairman then specifically directed and ordered appellant to answer the questions as they were put to him (325-349). Appellant nevertheless persisted in his refusal to answer (326-349).

After appellant had followed the aforementioned pattern for some 26 questions directed toward his presence at the Apalachin Meeting, and it was clear he intended to answer no further questions, his hearing was adjourned by the Commission pending further proceedings (350).

The Hearings in the Trial Court.

After appellant's separate hearing was adjourned by the Commission pending further proceedings, an order was obtained and served personally on appellant directing him to appear before the New York Supreme Court, New York County, to show cause why a warrant of commitment should not issue against him pursuant to Section 406, Civil Practice Act, for his refusal to answer the Commission's questions.

Appellant was the second recalcitrant witness to appear before Mr. Justice Spector, then sitting in the motion part of the trial court, to explain his refusal to testify. Another witness was heard and committed before appellant on August 12.

The trial court offered appellant full opportunity to explain why he had refused to testify. Appellant's counsel first chose to appear specially (762). Afterwards, however, he took complete advantage of the opportunity given him to make extensive argument and factual representations on the merits (765-785). Furthermore, the witness who preceded appellant had fully raised the same legal objections that appellant raised, and now raises, and the same judge who committed appellant had heard and passed upon these arguments (682-750). Appellant's counsel was present, and heard arguments made at the judicial hearing of the prior witness.

Prior to appellant's judicial hearing, the minutes of the Commission hearing had been transcribed and made available to both the Court and counsel. Adequate time was set aside by the Court to allow for

reading of the transcript before the commencement of appellant's judicial hearing (753). The Court stated its findings were based on a study of the transcript (786-787), which was very short and easily understood. After full argument as described above, the Commission's application was granted by the Court (787), and the warrant executed.

* * * * *

Since his commitment, appellant has been confined continuously to the Civil Jail of New York County under the custody of the Sheriff of the City of New York.

At no time, before or during the hearings of the Commission and the Court, or to the present, has appellant given any indication of a desire to answer the Commission's questions. Upon truthfully and responsively answering the questions put to him, appellant may secure his release pursuant to law (e.g. 52b [order], and 115 [warrant]).

Summary of Argument

As to Jurisdiction:

Appellant claims his appeal lies to this Court as of right, pursuant to Title 28, United States Code, Section 1257(2). There is no jurisdiction for such an appeal for several reasons:

POINT I

Appellant's Points II and V are not reviewable by this Court under Section 1257(2) or any other provision since they were never raised or passed upon in the New York courts, an essential jurisdictional requirement. Accordingly, this Court has no jurisdiction under any circumstances to review the arguments made under those Points.

POINT II

As respects his Points I, III, IV and V, appellant failed to show in his Jurisdictional Statement that he challenged below a state statute on the ground it was repugnant to the United States Constitution, treaties or laws. On this entirely different ground, therefore, appellant's asserted jurisdiction as a matter of right under Section 1257(2) is defective. Appellant's Point V, it should be noted, is jurisdictionally defective in this respect as well as that set forth above.

As to the Merits:

POINT III

There is no substance or merit to any of the five contentions appellant makes in his Jurisdictional Statement. Should this Court find no jurisdiction for appeal as of right, it should also refuse to grant certiorari because of the lack of substance in appellant's contentions. Should this Court find jurisdiction for appeal as of right as to any one of appellant's five points, it should affirm the decision of the New York Court of Appeals on the merits as to such point.

ARGUMENT

AS TO JURISDICTION:

POINT I

Appellant's Points II and V were not raised or passed upon in the state courts and are not reviewable by this Court.

1. **Appellant's Point II:**

In Point II of his Jurisdictional Statement appellant alleges Chapter 989 of the 1958 New York Laws, Section 7051, *et seq.*, New York Unconsolidated Laws (the Act creating the Commission), contravenes the Fourteenth Amendment to the United States Constitution in that it grants the Commission "ill-defined and omnipotent powers."

But the papers properly before this Court fail to reveal this issue was raised below. The transcripts of appellant's hearings, both before the Commission and the trial court, contain no reference to such an issue either expressly or by implication. In fact at no time during either of these hearings was the Fourteenth Amendment to the United States Constitution even mentioned. The Appellate Division opinion, similarly, is devoid of reference to the alleged issue.

The only colorable basis for appellant's allegation that this particular Fourteenth Amendment issue was raised below is the amended remittitur of the New York Court of Appeals. Amendment of the remittitur actually was made by the Clerk of that Court before the Commission had been notified of the nature of appellant's proposed amendments. But as so amended, it reads in part:

> "Upon the appeal herein on behalf of the appellant Maneuso there were presented and necessarily passed upon the following questions, viz.:
>
> * * * *
>
> "2. Whether the law creating the Commission of Investigation is unconstitutional so as to grant ill-defined and omnipotent powers to the Commission."

This amended remittitur is insufficient as a basis for appeal. It is essential to jurisdiction in this Court that appellant demonstrate the record on appeal "either expressly or by clear intendment" reveals a federal issue was raised in the state courts. *People of the State of New York* v. *Zimmerman*, 278 U. S. 63.

67 (1928). This Court there stated that if the record on appeal "left uncertain whether the claim of invalidity was grounded upon some provision of the State Constitution or some provision of the Constitution of the United States, or on both . . . there plainly would be no basis for review in this Court." (p. 68). This is exactly the defect in appellant's reliance on the amended remittitur, which fails to state whether or not the United States Constitution, or any section thereof, are the bases for his claim of unconstitutionality. As *Zimmerman* made clear, in such cases this Court will presume the decision below was based upon a challenge under the State Constitution. To the same effect are: *Bowe* v. *Scott*, 233 U. S. 658 (1914); *New York Central & H. R. Co.* v. *New York*, 186 U. S. 269 (1902).

In addition, appellant's briefs in the New York courts strongly support the presumption that his challenge to Chapter 989 was made only in reference to the New York Constitution and not the United States Constitution. The only constitutional reference in his briefs on this point is to Article III, Section 1, of the New York State Constitution, which provides all legislative power shall be vested in the State Senate and Assembly. Appellant's argument on this point appears to be that the delegation of "omnipotent and ill-defined powers" to the Commission violates the principle of separation of powers embodied in Article III, Section 1, of the New York State Constitution. The New York courts gave no credence to this argument and decided there was no violation of the doctrine of separation of powers under the New York Constitution. That decision is the final word on this entirely state issue since there is no federal consti-

tutional requirement that a state adhere to the principle of separation of powers. *Dreyer v. Illinois*, 187 U. S. 71 (1902).

Appellant's Point II is further defective jurisdictionally in that it fails to set forth the specific provision or provisions of Chapter 989, the Act establishing the Commission, which he challenges on constitutional grounds. *Yazoo & M. V. R. Co. v. Adams*, 180 U. S. 41 (1901). This Act is composed of 13 different sections, together with numerous subsections, most of which are in no respect applicable to this proceeding. Section 7051, *et seq.*, New York Unconsolidated Laws. Vague and unspecified claims of unconstitutionality obviously can provide no basis for jurisdiction in this busy Court.

2. **Appellant's Point V:**

In Point V of his Jurisdictional Statement appellant alleges that by his commitment he has been deprived of his right to assembly freely in contravention of the First and Fourteenth Amendments to the United States Constitution. Here too, appellant's jurisdiction is fatally defective since the record before this Court fails to reveal this issue was raised below. There is no mention of this issue in the transcripts of appellant's hearings before either the Commission or the trial court, nor is this issue discussed in the opinion by the Appellate Division. The Court of Appeals' remittitur contains no reference to this issue. Omission of this issue from the amended remittitur is especially significant since appellant's proposed amended remittitur specifically requested that

this issue be included. The Court of Appeals, however, refused to do so. There is absolutely no basis on which appellant can contend that this issue was raised and passed upon by the courts of the State of New York.

POINT II

Appellant has failed to show that the New York Statutes he now claims are repugnant to the United States Constitution were so attacked and passed upon below and, therefore, appellant cannot meet the jurisditional requirements for appeal as a matter of right as to his Points I, III, IV and V.

1. Appellant's Points I and III:

The Commission's arguments with respect to the jurisdictional defects of appellant's Points I (alleged deprivation of a fair hearing) and III (an attempted revisitation of the holdings in *Knapp v. Schweitzer*, 357 U. S. 371 (1958) and *Mills* v. *Louisiana*, 27 U. S. L. W. 4420 (June 8, 1959)) are set forth at pages 11 to 13 of the Commission's Motion to Dismiss the appeal of Paul Castellano (Oct. Term 1959, No. 72).

2. Appellant's Point IV:

In his fourth "Question Presented" appellant contends Section 406 of the New York Civil Practice Act is repugnant to the Eighth Amendment to the

United States Constitution in that it sanctions or may be the vehicle for incarceration under an "indefinite term." The question so phrased purports to qualify for appeal pursuant to Title 28, United States Code, Section 1257(2), which requires a showing that a state statute was challenged in the courts below as repugnant to some provisions of federal law. The amended remittitur of the New York Court of Appeals fails to disclose however, that the question he now poses was necessarily passed upon in the New York courts; it contains no indication of which New York statute is or was attacked. The circumstances under which the remittitur was amended are related above (p. 13, *supra*). The remittitur reads, in pertinent part, as follows:

> "Upon the appeal herein on behalf of the appellant Mancuso there were presented and necessarily passed upon the following questions, viz.:
>
> * * * *
>
> "4. Whether appellant Mancuso was deprived of his liberty for an indefinite time in violation of the Eighth Amendment to the United States Constitution."

For all that the amended remittitur reveals, the Court of Appeals could just as well have disposed of appellant's contentions by merely holding the Eighth Amendment to the United States Constitution inapplicable to state proceedings. Such a holding would not involve passing on the repugnance of a state statute to federal law. Appellant has not, and cannot, demonstrate that the New York Court of Appeals did not so hold.

As will be demonstrated below, appellant's underlying premise that the Eighth Amendment applies to the states is so frivolous and without merit as to make it probable that the Court of Appeals did, in fact, dispose of this argument by appellant through swiftly rejecting this underlying premise. Because appellant cannot show that the Court of Appeals necessarily passed upon the alleged repugnance of Section 406 to the Eighth Amendment, there can be no appeal as a matter of right.

3: **Appellant's Point V:**

In Point V of his Jurisdictional Statement appellant alleges that by his commitment he has been deprived of his right to assemble freely in contravention of the First and Fourteenth Amendments to the United States Constitution. Even if this issue had been raised in the New York courts (and the Commission has demonstrated above that it has not), it would not present a question reviewable as a matter of right under Section 1257(2), for it fails to contain the mandatory assertion that a state statute was attacked below as repugnant to the right to assemble freely which is granted by the First and Fourteenth Amendments to the United States Constitution. Indeed, appellant cites no statute whatsoever in his argument.

AS TO THE MERITS:

POINT III

In addition to the jurisdictional defects described above, the questions raised by appellant are not substantial and do not warrant consideration by this this Court.

1. **Appellant was accorded full due process protection during this proceeding (Appellant's Point I).**

The Commission's argument on this point is set forth at pages 16 to 19 of its Brief in Opposition to the Petition of Michele Miranda for a Writ of Certiorari (October Term, 1958, No. 893).

There are minor factual differences between the trial court hearings of appellant and Miranda. These differences, however, do not affect the legal position of either. They have not been denied full due process protection, and their claims concern minutiae of state civil procedure which have been decided unanimously against them by the appropriate forum—the state's highest courts. Miranda is precluded from successfully establishing a due process claim because of his deliberate waiver of his right to contest on the merits by virtue of his special appearance. On the other hand, after first stating he was appearing specially, appellant chose to avail himself of his opportunity for a hearing. He made extensive legal argument and offered factual representations; that they did not

persuade and are not substantial is not a deprivation of due process.

Appellant's argument before the trial court makes it perfectly clear that the sole purpose of his requested adjournment was to enable him to "prepare a brief [and] submit it on this order to show cause" (768). Denial of an adjournment, in the exercise of the trial court's discretion, hardly amounts to a deprivation of due process protection under such circumstances.

Moreover, there can be no serious claim of deprivation of rights on the ground of surprise for two additional reasons. At the hearings appellant was represented by counsel and came fortified with prepared legal statements drawn in advance of the hearings, as did Miranda. Similarly, appellant's attorney attended the prior proceeding which resulted in the commitment of a recalcitrant witness, thereby apprising himself of the legal consequences which might, and did in fact, result from his client's refusal to testify. Appellant consciously and stoically made his choice with full knowledge: he was bound to defy this lawful inquiry and the Court even if it meant his imprisonment. No amount of rhetoric can avoid that obvious truth.

2. The State Act establishing the Commission is not in conflict with the Fourteenth Amendment to the United States Constitution (Appellant's Point II).

As already demonstrated, appellant has not, and indeed cannot, demonstrate the New York courts passed upon the federal question he alleges in Point II of his Jurisdictional Statement: that the Act establishing

the Commission is unconstitutional as it "violates the Fourteenth Amendment" to the United States Constitution. But even if appellant could demonstrate the New York courts had passed upon this question, his appeal as to Point II must be dismissed. This is so for two reasons: First, because contrary to the principle enunciated by this Court in *Barenblatt* v. *United States*, 27 U. S. L. W. 4366 (June 8, 1959), appellant's refusal to answer before the Commission was not grounded upon an objection to the alleged "omnipotent and ill-defined" delegation of power to the Commission; rather, the first time this particular objection was ever mentioned was at the appellate level. Second, no objection based on *Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957), can be raised here since appellant knew exactly the nature of the Commission's inquiry. He was clearly advised of the subject matter of the hearing by a subpoena served upon him, the Commission's resolution, and the Commission's opening statement at the hearings; the questions were simple and direct; *Sweezy* also has no applicability since the Commission is a fully independent state agency, not an arm of the New York State Legislature, and therefore no problem of the separation of power from responsibility to hold hearings is presented.

3. Appellant's rights against compulsory self-incrimination under the United States Constitution were not infringed and cannot be prejudiced by this State proceeding (Appellant's Point III).

The Commission's argument on this point is set forth at pages 14 to 15 of its Motion to Dismiss the appeal of Paul Castellano (Oct. Term, 1959, No. 72).

4. Appellant's confinement until he complies with a lawful court order does not abridge his rights under the Eighth Amendment to the United States Constitution. (Appellant's Point IV).

It is settled that the Eighth Amendment to the United States Constitution does not extend to the states or state proceedings. *Pervear* v. *Massachusetts*, 72 U. S. (5 Wall.) 475 (1867); *In re Kemmler*, 136 U. S. 436 (1890); *accord*, *Knipp* v. *Schweitzer*, 357 U. S. 371 (1958), footnote 5 at 378.

Petitioner's contention that his incarceration under Section 406 amounts to cruel and unusual punishment is also specious. Petitioner himself determines his time of release, for all he need do is testify truthfully and responsively to comply with the order of the court. *People ex rel. Valenti* v. *McCloskey, Sheriff, and Commission of Investigation*, 8 A. D. 2d 74, N. Y. S. 2d (1959), *aff'd*, N. Y. 2d (July 8, 1959). Incarceration where one may be released at any time by telling the truth is not "cruel;" incarceration for refusal to comply with a lawful order of a court is not "unusual;" and, a coercive order under Section 406 is a time-honored civil remedy and not "punishment." *Maggio* v. *Zeitz*, 333 U. S. 56 (1948); *Oriel* v. *Russell*, 278 U. S. 358 (1929); *Beeres* v. *Crowenshield*, 162 Misc. 148, 292 N. Y. Supp. 756 (1936), *aff'd*, 274 N. Y. 74, 8 N. E. 2d 283 (1937); *J. R.* v. *M. P.*, Y. B. 37 Hen. VI f. 13, pl. 3 (C. Common Pleas 1459) (set out in Field & Kaplan, Civil Procedure (1953), pp. 268-270). As to this point, see also the Commission's argument set forth on pages 5 to 6 of the Commission's Brief in Opposition to the Petition for a Writ of Certiorari of Paul Castellano (Oct. Term, 1958, No. 940).

5. Appellant's Right to Assemble Freely, as Guaranteed by the First and Fourteenth Amendments to the United States Constitution, has not been abridged (Appellant's Point V).

Appellant contends the Commission's investigation of the "Apalachin Meeting," and its inquiries of him in the course of that investigation, somehow abridged his right of peaceable assembly as guaranteed by the First and Fourteenth Amendments to the United States Constitution.

This contention is utterly frivolous. The Commission was not in existence at the time of the Apalachin Meeting at Mr. Barbara's home and could not have taken steps to impede appellant's presence at that meeting. All it is attempting to do now is make inquiry concerning that past event. In addition, there has been no indication that inquires of this nature will prevent appellant from similar activity—a choice which is appellant's alone. Thus, no action of the Commission has abridged this right of appellant's.

The right to assemble is not absolute at any rate, and there can be no doubt a State has the right to make inquiry of a particular and highly suspect meeting in aid of its fundamental police powers. Certainly it has the right merely to inquire as to the organization and nature of that meeting.

Conclusion

Appellant's Points II and V were not raised in the state courts and should not be reviewed in this Court.

No showing has been made as to appellant's Points I, III, and IV, and V as well, that he challenged a state statute below as repugnant to the United States Constitution, treaties or laws. As to those points, the jurisdictional requirements for appeal to this Court as a matter of right under Title 28, United States Code, Section 1257(2), have not been satisfied and the appeal, in its entirety, should be dismissed.

The federal questions raised by appellant are not substantial and, in the alternative, if jurisdiction for appeal is found, the decision of the New York Court of Appeals should be affirmed in all respects. If jurisdiction for appeal as of right is not found certiorari should be denied.

Respectfully submitted,

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APPENDIX

Constitutional Provisions Cited in the Jurisdictional Statement and the Motion to Dismiss.

UNITED STATES CONSTITUTION

1. *Amendment I*

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. *Amendment V*

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. *Amendment VI*

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

4. *Amendment VIII*

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

5. *Amendment XIV*

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATE CONSTITUTION

Article III, Section 1

"Section 1. The legislative power of this State shall be vested in the Senate and Assembly."